ILE COPY

Office Supreme Court, U.S.
FILED
DEC 24 1958
JAMES R. BROWNING, Clerk

No. 516

In the Supreme Court of the United States

OCTOBER TERM, 1958

SPRINGFIELD TELEVISION BROADCASTING CORPORATION AND GREENFIELD TELEVISION BROADCASTING CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
VICTOR R. HANSEN,
Assistant Attorney General,
CHARLES H. WESTON,
Attorney,
Department of Justice, Washington 25, D. C.

JOHN L. FITZGERALD,
General Counsel,
RICHARD A. SOLOMON,
Assistant General Counsel,
RUTH V. REIL,
Counsel,
Federal Communications Commission,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	7
Conclusion	11

CITATIONS

Cases:

Coastal Bond Television Co. v. *Federal Communications Commission*, 234 F. 2d 686	9
National Broadcasting Co. v. *United States*, 319 U. S. 190	9
National Labor Relations Board v. *Seven-Up Bottling Co.*, 344 U. S. 344	9
Sanganon Valley Television Corp. v. *United States*, No. 235 (Oct. Term 1958)	10
Securities & Exchange Commission v. *Chenery Corp.*, 332 U. S. 194	9
Securities & Exchange Commission v. *Chenery Corp.*, 318 U. S. 80	10
WIRL Television Co. v. *United States*, No. 242; this Term	2, 10

Statutes and regulations:

Federal Communications Act of 1934, 47 U. S. C. 151, *et seq*	2
Sec. 303 (f)	5
Sec. 316	5
47 C. F. R. 3606	2

491901—58

Miscellaneous:

	Page
22 F. C. C. 293	5
22 F. C. C. 307	5
22 F. C. C. 318	5
22 F. C. C. 342	5
22 F. C. C. 365	5
22 F. C. C. 382	5
23 F. C. C. 358	5
21 F. R. 4958	3
21 F. R. 4968–4973	4
Pike & Fisher, Radio Regulation:	
Vol. 1, pt. III, 91: 601, *et seq*	3
Vol. 13, 1571	3, 4

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 516

SPRINGFIELD TELEVISION BROADCASTING CORPORATION AND GREENFIELD TELEVISION BROADCASTING CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 259 F. 2d 170. The decision of the Federal Communications Commission (R. 751–760) is reported at 22 F. C. C. 332, and its order denying rehearing (R. 869–872) at 23 F. C. C. 57.

JURISDICTION

The judgment of the court of appeals affirming the orders of the Commission was entered on June 19, 1958. By order of the Chief Justice dated September

10, 1958, the time for filing a petition for certiorari was extended to November 15, 1958. The petition for a writ of certiorari was filed on November 14, 1958. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1) and 47 U. S. C. 402 (j).

QUESTIONS PRESENTED

1. Whether the Commission's decision not to change its prior assignment of television Channel 3 to Hartford, Connecticut, is based on adequate findings and conclusions.

2. Whether the validity of the Commission's orders is affected by its rulings in other channel reallocation proceedings or by the action of this Court in *Sangamon Valley Television Corporation* v. *United States* and *WIRL Television Company* v. *United States*, Nos. 235 and 242, this Term.

STATUTE INVOLVED

The pertinent provisions of the Communications Act of 1934, 47 U. S. C. 151, *et seq.*, are set forth in the petition (p. 3).

STATEMENT

The Federal Communications Commission on March 1, 1957, after full rule-making proceedings, declined to amend Section 3.606 of its Rules (47 C. F. R. 3.606), comprising a nationwide allocation of television channels, by reassigning very high frequency (VHF) Channel 3 from Hartford, Connecticut, to Providence, Rhode Island, and by substituting ultra high frequency (UHF) Channel 61 in Hartford (R. 751–760). The Commission's action, reaffirmed on reconsideration on June 24, 1957 (R.

869–872), leaves standing the channel allocations made in 1952 in the Commission's Sixth Report and Order (1 Pike & Fischer, Radio Regulation Part III, 981:601, *et seq.*), under which 13 UHF channels were assigned to the Connecticut-Rhode Island area and two VHF channels to each state. In Connecticut VHF Channels 3 and 8 were assigned to Hartford and New Haven, respectively; in Rhode Island VHF Channels 10 and 12 were assigned to Providence (R. 753).

In allocating television channels throughout the nation in 1952, the Commission had believed it was feasible to increase the number of facilities available to particular communities by "intermixing" in the same area both the 12 available VHF channels and the 70 UHF channels. However, as a result of a general rule making proceeding (Docket No. 11532) examining the overall television allocation structure, the Commission determined in its report and order of June 26, 1956 (21 F. R. 4958, 13 Pike & Fischer, Radio Regulation 1571) that the disparity between VHF and UHF channels was such that direct competition by VHF channels frequently jeopardized the successful continuance of UHF operations. Accordingly, the Commission in its report and order gave consideration to other means of assuring an adequate national television service. The Commission determined that any effort at nationwide "deintermixture", *i. e.*, making some communities all VHF and others all UHF, would not be a feasible solution. It felt that, in view of the limited number of areas in which UHF was established, a serious public hardship would result

from any widespread enforced changeover and that, in view of terrain factors, many rural areas were necessarily dependent on VHF at the existing stage of television equipment development. After considering and rejecting other proposals which had been advanced, it concluded that a long range program of shifting all commercial television to the UHF portion of the spectrum might be the best solution of the problem.

Since effectuation of any such plan would require considerable additior study and time to overcome technical obstacles, the Commission further decided that it would consider interim action to alleviate the situation in a limited number of individual cases where this might be feasible. The Commission set forth general criteria to be considered in determining what areas would be deemed appropriate for channel shifts, but stated (13 Pike & Fischer, Radio Regulation 1571, 1582):

> Because of the widely varying circumstances in individual markets and the numerous factors which bear on the choice of techniques in any individual community or area, it is not possible to formulate rigid criteria whose perfunctory application to individual cases will automatically indicate the course which would best serve the public interest in each community during the interim period.

On the same date, June 26, 1956, the Commission on its own motion issued Notices of Proposed Rule Making looking towards amendment of the Table of Assignments in some 13 areas (21 F. R. 4968–4973). One of these was to determine whether the public in-

terest would be served by transferring VHF Channel 3 from Hartford to Providence and by substituting a UHF channel in Hartford (R. 1–3). Following lengthy comments and reply comments by both proponents and opponents, the Commission on March 1, 1957, issued a report and order deciding against the transfer and on June 24, 1957 reaffirmed this decision upon reconsideration (R. 751–758, 869–872).[1] The Commission found that the deletion of Channel 3 from Hartford would deprive a substantial number of persons in Connecticut and Massachusetts of their only service, and a much larger number of a second service, because the wooded and hilly terrain in a large part of the Connecticut Valley is not suited to UHF reception (R. 755–756, 870–871).[2] This loss of service in the Hartford area, the Commission noted (R. 871, 756–757), would not be compensated for by any gain around Providence, since there are no areas of Rhode Island presently without service. In addition, the Commission found that Channel 3 could not be used

[1] On March 1, 1957 the Commission also issued decisions and orders in six of the other proceedings begun on June 26, 1956. The Commission deleted VHF channels, either finally or subject to show cause proceedings under Sections 303 (f) and 316 of the Communications Act, in Elmira, New York (22 F. C. C. 307; Springfield, Illinois (22 F. C. C. 318); Peoria, Illinois (22 F. C. C. 342); Fresno, California (22 F. C. C. 365); Evansville-Hatfield, Indiana (22 F. C. C. 382); and Albany, New York (22 F. C. C. 293). The Commission's action in Albany was subsequently changed after further rule making (23 F. C. C. 358).

[2] VHF, with its superior propagation characteristics, can provide service to pockets in the rugged terrain areas which the easily deflected UHF signals do not satisfactorily reach (R. 870–871, 755–756).

efficiently either in Providence or in other communities in southern Rhode Island (R. 871, 756–757). In order to comply with the rules regarding minimum transmitter spacings, a station operating on Channel 3 would have to locate its transmitter so far south of Providence that it would provide a city-grade signal to only a very small portion of the city, would cause adjacent channel interference, and would be seriously handicapped in competing with the two existing VHF stations in Providence and two Boston VHF stations which provide strong signals over Providence (*ibid*). In view of these circumstances, the Commission concluded that the public interest required the continued assignment of Channel 3 to Hartford (R. 758, 872).[3]

On appeal, the court of appeals unanimously affirmed the Commission's orders (Pet. App. A, 29–34). The court noted (*id.* 31–32) that petitioners' principal contention was that the Commission's decision was irrational and arbitrary because it had not found it necessary to set forth what would be the impact of a second VHF station in the Connecticut Valley on existing UHF operations. The court, after review of

[3] A comparative proceeding to award Channel 3 was pending before the Commission when rule-making was instituted. The Commission made a grant to Travelers Broadcasting Service Corporation on July 25, 1957, but conditioned the grant upon its right to substitute for Channel 3 such other channel as might be assigned to Hartford in lieu of that channel at the conclusion of the rule making proceeding, and also suspended all construction pursuant to the permit until after the rule making was concluded (R. 920). Following its determination in the rule making proceeding to adhere to the status quo, the Commission deleted these conditions (R. 919–920) and subsequently denied petitioners' petition for reconsideration (R. 921–922, 943).

the matter, held that the Commission's orders were not "arbitrary, unreasonable, or without ample support" (*id.* 34).

After summarizing the grounds upon which the Commission based its decision (*id.* 32–33), the court stated that it agreed with the Commission that it is "impossible to use rigid criteria as the basis for a decision to deintermix or not to deintermix any particular community, because of the widely varying circumstances in individual markets and the numerous factors which bear on the choice in each area" (*id.* 33–34). The problem, said the court, was "an evaluation of factors, differing in each situation", and Congress had put such evaluation "primarily in the hands of its agent, the Commission" (*id.* 34). The court held that in the instant case the conclusions of the Commission "were not only rational but reasonable" (*ibid.*). It observed: "The VHF station at Hartford had benefits for the area, and the move to Providence would have been fraught with many practical difficulties" (*ibid.*). And the court, after noting that petitioners were seeking a change in a VHF allocation which had been in existence as long as their own UHF allocations and that petitioners had taken licenses "with full knowledge of the situation", declared that it was not impressed by petitioners' argument as to the adverse effect on their operations if the VHF channel were allowed to remain in Hartford (*ibid.*).

ARGUMENT

1. Petitioners' primary contention that the decision below contravenes the policies of the Communications Act (Pet. 15–21) is, in substance, a contention that the

decision to retain Channel 3 in Hartford was based on inadequate findings and conclusions. This presents no issue of statutory construction or communications policy, but solely the question, determined adversely to petitioners by the court below, whether there were adequate grounds for the Commission's determination that deletion of the Hartford channel would not serve the public interest in securing optimum television service for the areas involved. More concretely, the question is whether the Commission erred as a matter of law in ruling that, even if deletion would be beneficial to existing UHF operations, deletion was not in the public interest because in that event substantial populations in terrain pockets, not reached by UHF signals, would lose a first or second service, and because there were no satisfactory alternative use for the channel. The court below held that the conclusions of the Commission were "not only rational but reasonable". Nor are its orders invalid because of failure to set forth the grounds for its action. On the question of the weight to be given to possible injury to UHF licensees if Channel 3 remained in Hartford, the Commission in its report denying reconsideration said (R. 872):

> While we are concerned with preserving UHF as a part of our nationwide television system, our primary purpose in the individual role [*sic.*] making proceedings is the effectuation of a television allocation in the particular communities and areas involved that would provide the most satisfactory service to the public. We are not endeavoring to protect particular UHF

> stations from competition, nor is our primary objective the assistance of UHF. The ultimate test comes down to whether the allocation will, in our judgment, be likely to provide the best television service to the public.

The Commission's conclusion that the factors foreclosing the proposed transfer outweighed any possible adverse impact upon existing UHF stations is "precisely the sort of question which Congress, by employing the broad language of Section 303, wished to commit to the discretion of an expert administrative agency, not the courts." *Coastal Bend Television Co.* v. *Federal Communications Commission*, 234 F. 2d 686, 690 (C. A. D. C.). Cf., *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 224–225; *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194, 202–209; *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 348–349.

2. The Commission's determination is not vitiated by the fact that in certain other "deintermixture" proceedings it concluded that, on their particular facts, deintermixture was in the public interest. There necessarily was variance in the relevant facts in these proceedings, leading to different conclusions. Nor is the decision vitiated by the fact that in the instant case the Commission majority included a Commissioner who had dissented from the decisions granting deintermixture. Here, the Commission's comprehensive reports (R. 751–758, 869–872) deal solely with the question of whether removal of Channel 3 from Hartford would or would not be in the public interest, and they nowhere even remotely sug-

gest that lack of statutory authority was a factor in the decision not to deintermix. Petitioners themselves recognize (Pet. 22) that "the validity of agency action must be determined on the ground on which the agency itself places its decision". We submit that this very test, and petitioners' supporting citation of *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, dispose of their contention (Pet. 21–24) based upon a Commissioner's dissents in the proceedings in which the Commission ordered deintermixture.

3. Petitioners' contention (Pet. 27–28) that the decision below should be vacated and the case remanded to the court of appeals because of the action of this Court in *Sangamon Valley Television Corporation* v. *United States* and *WIRL Television Company* v. *United States*, Nos. 235 and 242, this Term, is, we believe, without merit. There is no factual interrelationship between the Commission's decisions in those cases to delete VHF channels in Springfield and Peoria, Illinois, and its determination here, upon the basis of facts peculiar to Connecticut Valley, to leave standing the VHF allocation to Hartford. In addition, we are aware of no subsequent testimony before a Congressional Committee or other development to indicate that any *ex parte* representation was made to any Commissioner on the merits of the instant rule-making proceeding—the basis for the orders entered by this Court in *Sangamon* and *WIRL*. We submit that, in these circumstances, petitioners show no basis for vacating the judgment of the court below.

CONCLUSION

The decision below is correct, no important issue calling for further review by this Court is presented, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
VICTOR R. HANSEN,
Assistant Attorney General.
CHARLES H. WESTON,
Attorney.

JOHN L. FITZGERALD,
General Counsel,
RICHARD A. SOLOMON,
Assistant General Counsel,
RUTH V. REEL,
Counsel,
Federal Communications Commission.

DECEMBER 1958.

U. S. GOVERNMENT PRINTING OFFICE 1958